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HOUSE BILL 455

44TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 1999

INTRODUCED BY

Pauline K. Gubbels

AN ACT

RELATING TO WATER RIGHTS; ENACTING THE NEW MEXICO WATER BANKING ACT AND AMENDING SECTIONS OF THE NMSA 1978 TO CREATE AN AUTHORITY AND BOARD TO REGULATE WATER BANKING OF CONSERVED AND SURPLUS WATER AND TO ESTABLISH A FUND; MAKING AN APPROPRIATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. [NEW MATERIAL] SHORT TITLE. -- Sections 1 through 16 of this act may be cited as the "New Mexico Water Banking Act".

Section 2. [NEW MATERIAL] LEGISLATIVE PURPOSE. -- The legislature finds that a reliable and sustainable water supply for current and future needs is imperative for the state's economic growth and prosperity and may be enhanced through water banking. The purposes of the New Mexico Water Banking

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1 Act are to:

2 A. achieve a reliable and sustainable water supply
3 by making better and more extensive use of water resources in
4 the state;

5 B. develop and apply innovative technologies and
6 management strategies for water conservation, storage, meeting
7 demands and marketing;

8 C. encourage the conservation of water and ensure
9 that conserved and surplus water is available for other uses
10 and users through transfers administered by the authority;

11 D. permit greater access to known resources of
12 available water to water users who need additional supply;

13 E. amend water forfeiture statutes to delay their
14 application to water rights deposited in the water bank for
15 use by others who have current needs for water resources;

16 F. facilitate voluntary transactions that would
17 release water from low-value uses and direct them toward
18 high-value applications and sharing profits from these
19 arrangements with water depositors;

20 G. provide legal mechanisms for conserving and
21 salvaging water that is otherwise surplus to customary
22 agricultural and other beneficial uses while preserving the
23 rightful possession of a water right, permit or license;

24 H. permit public uses of unused, conserved or
25 surplus water rights for the benefit of the public interest;

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1 I. provide a market conduit for unused, conserved
2 or surplus water rights and resources;

3 J. provide an alternative to forfeiture for
4 unused, unneeded or conserved water rights by permitting
5 transfers authorized by the state engineer and administered by
6 the board; and

7 K. promote economic development in the state by
8 providing alternative water availability solutions for
9 agricultural, environmental, municipal, industrial,
10 commercial, recreational and residential interests in the
11 state.

12 Section 3. [NEW MATERIAL] DEFINITIONS. --As used in the
13 New Mexico Water Banking Act:

14 A. "authority" means the New Mexico water bank
15 authority;

16 B. "board" means the New Mexico water bank board;

17 C. "deposit" means the placement of a water right
18 or portion of a water right in the water bank for transfer;

19 D. "depositor" means the owner of a water right
20 who deposits the water right or a portion of the water right
21 in the water bank;

22 E. "transfer" means the conveyance of a water
23 right or a portion of a water right by sale or lease;

24 F. "water bank" means the New Mexico water bank;

25 G. "water right" means a right acquired or

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1 authorized pursuant to the laws of this state to impound,
2 divert or use surface water or ground water to the extent
3 authorized by law; and

4 H. "withdrawal" means the removal of a deposit in
5 the water bank by the depositor.

6 Section 4. [NEW MATERIAL] NEW MEXICO WATER BANK BOARD
7 CREATED-- APPOINTMENT-- QUALIFICATIONS-- TERMS-- EX-OFFICIO
8 MEMBERS.--

9 A. The "New Mexico water bank board" is created to
10 administer the New Mexico Water Banking Act through the
11 authority.

12 B. The board shall be composed of seven public
13 members, appointed by the governor for four-year terms, whose
14 service on the board shall be without compensation except for
15 expense reimbursement made in accordance with the Per Diem and
16 Mileage Act. For initial terms, two members of the board
17 shall be appointed for four-year terms, two members shall be
18 appointed for three-year terms and three members shall be
19 appointed for two-year terms. Thereafter, all appointments
20 shall be for four-year terms. Members shall be chosen for
21 their expertise and experience in water rights and water
22 resources fields. Each member shall reside in a geographic
23 area of the state different from each other member. No more
24 than four of the members shall be of the same political party.
25 Members may serve two terms and shall remain in office until

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1 their respective successors have been appointed and have
2 agreed to serve. The members shall annually elect a member to
3 serve as chairman of the board.

4 C. The state engineer, chairman of the interstate
5 stream commission and secretary of environment shall be
6 ex-officio members of the board, without vote.

7 Section 5. [NEW MATERIAL] NEW MEXICO WATER BANK
8 AUTHORITY CREATED--EMPLOYMENT AND DISCHARGE OF DIRECTOR--
9 EMPLOYEES. --

10 A. The "New Mexico water bank authority" is
11 created under the direction of the board.

12 B. The board shall appoint and fix the salary of a
13 full-time director who shall serve at the pleasure of the
14 board, and, pursuant to the direction of the board, the
15 director shall employ such employees of the authority as are
16 proper and necessary and prescribe their duties and
17 compensation.

18 Section 6. [NEW MATERIAL] BOARD AND AUTHORITY--POWERS
19 AND DUTIES.--The authority, acting at the direction of the
20 board, shall:

21 A. administer, implement and enforce the New
22 Mexico Water Banking Act;

23 B. administer, operate and regulate the water
24 bank;

25 C. encourage water rights owners to implement

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1 water conservation practices;

2 D. educate the public, including political
3 subdivisions of the state, about the water bank and the
4 benefits of depositing conserved or surplus water in the water
5 bank;

6 E. establish requirements for a deposit of a water
7 right or portion of a water right into the water bank,
8 including:

9 (1) terms and conditions for deposit and
10 withdrawal, including the procedure and penalties for early
11 withdrawal;

12 (2) the procedure for determining eligibility
13 of water rights for deposit;

14 (3) the procedure and formula to quantify
15 water rights to be deposited;

16 (4) the eligibility of water rights for
17 deposit, considering legal entitlement, ownership, validity,
18 recent historical use and absence of legal restrictions;

19 (5) the priority order, if any, of water
20 rights to be leased or sold by the water bank; and

21 (6) monitoring to determine and penalties for
22 improper use of deposited or transferred water;

23 F. facilitate the transfers of water rights from
24 the water bank for future beneficial use, including:

25 (1) making annual determinations of available

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1 deposited water to be transferred;

2 (2) making annual determinations of the fees
3 for transfer of deposited water;

4 (3) establishing the formula to calculate the
5 annual pro rata interest of each depositor in transfers made
6 during the previous year and computing each depositor's
7 entitlement of proceeds;

8 (4) negotiating the terms of a transfer;

9 (5) maintaining a registry of deposits and
10 persons who have registered with the water bank and
11 identifying a beneficial use for additional water supplies;
12 and

13 (6) informing persons listed on its registry
14 about water rights available from the water bank;

15 G. purchase, hold and sell water rights in its own
16 name;

17 H. negotiate and contract for or acquire the use
18 of existing surface facilities or reservoirs to store
19 deposited water not transferred during any year of its term of
20 deposit;

21 I. determine compliance with the necessary
22 standards for stored water, considering the obligations of the
23 board and authority pursuant to surface storage reservoir
24 contracts, if any;

25 J. establish injection standards, in conjunction

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1 with other state agencies having authority regarding water
2 injection schemes or water quality, for deposited water not
3 including oil and gas water to be injected through direct
4 surface or direct subsurface methods into underground
5 aquifers;

6 K. subject to Sections 13 and 14 of the New Mexico
7 Water Banking Act, establish fees to be paid to the water bank
8 fund for transfers and the administrative and operational
9 costs of the water bank, the board and the authority;

10 L. establish procedures for making, transferring
11 or withdrawing a deposit; determining the priority of
12 transfers, the reports and records of a transfer and the fees
13 associated with transfers; and other actions;

14 M report annually to the legislature regarding
15 deposits, withdrawals and transfers made, identifying the
16 number of persons and water rights involved in all deposits,
17 withdrawals and transfers; existing and anticipated future
18 storage needs of the water bank; and other operations of the
19 water bank, the board and the authority;

20 N. promulgate rules to implement the New Mexico
21 Water Banking Act and to administer, operate and regulate the
22 water bank;

23 O. contract with any person to achieve or further
24 the purposes of the New Mexico Water Banking Act;

25 P. file suit in its own name and be sued; and

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1 Q. take all other actions necessary or advisable
2 to facilitate deposits and transfers and to achieve or further
3 the purposes of the New Mexico Water Banking Act.

4 Section 7. [NEW MATERIAL] NEW MEXICO WATER BANKING ACT
5 EXCLUSIVE. -- Water rights shall not be banked or eligible for
6 storage in either surface facilities or reservoirs or
7 underground aquifers in this state, except in accordance with
8 the New Mexico Water Banking Act and authorizations of law,
9 compacts or contracts of the state valid on the effective date
10 of the New Mexico Water Banking Act; provided that the water
11 bank may accept water rights of Indian nations, tribes or
12 pueblos for banking and storage in accordance with the terms
13 of that act.

14 Section 8. [NEW MATERIAL] DEPOSITED WATER RIGHTS--
15 USES--PUBLIC INTEREST USE. --

16 A. In accordance with rules promulgated by the
17 board, a water right or portion of a water right deposited in
18 the water bank during the term of the deposit may:

19 (1) not be used by the depositor, his heirs,
20 successors or assignees;

21 (2) be transferred, stored or used for public
22 interest uses by the water bank in accordance with the New
23 Mexico Water Banking Act and rules of the board; or

24 (3) be withdrawn by the depositor in
25 accordance with the New Mexico Water Banking Act, the rules of

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1 the board and the terms of the deposit.

2 B. During the term of the deposit, water that is
3 neither transferred nor stored during any year may be used for
4 in-stream environmental, recreational, flushing or other
5 public interest uses, as determined by the board; provided
6 that the public interest use shall not interfere with any
7 obligation, compact or other interest of the state.

8 Section 9. [NEW MATERIAL] STORAGE IN SURFACE FACILITIES
9 AND RESERVOIRS AND RECOVERY OF DEPOSITED WATER. --The board,
10 through the authority, may store deposited water in existing
11 surface facilities or reservoirs in the state during the term
12 of the deposit. The board shall promulgate rules to implement
13 storage and recovery of deposited water in and from surface
14 facilities and reservoirs for transfers, alternative surface
15 storage, public interest uses, ground water storage and
16 conversion to water bank ownership, withdrawal or reversion to
17 public water.

18 Section 10. [NEW MATERIAL] STORAGE AND RECOVERY OF
19 DEPOSITED WATER IN UNDERGROUND AQUIFERS--WATER BANK-OWNED
20 WATER. --In any year of a deposit term, the water bank may
21 store available deposited water, unneeded during that year for
22 transfers or public interest uses, in underground aquifers.
23 Upon being stored in an underground aquifer, through direct or
24 indirect surface or direct subsurface methods, the water is
25 deemed abandoned by the depositor and converted to water bank

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1 ownership for subsequent recovery by the water bank for sale,
2 lease, public interest or other use by the water bank, without
3 compensation, credit or proceeds paid to or for the depositor.
4 The water bank shall not use water converted to water bank
5 ownership under the provisions of this section in competition
6 with or in any manner detrimental to its obligations or
7 responsibilities to depositors and deposited water rights.
8 The board may delegate its authority for storage of water in
9 underground aquifers to another entity, which shall comply
10 with all the provisions of the New Mexico Water Banking Act.

11 Section 11. [NEW MATERIAL] PRESUMPTION OF

12 NON-IMPAIRMENT. --A transfer by the board through the authority
13 of a deposited water right for any year, during the term of
14 the deposit, shall create a rebuttable presumption that the
15 transfer does not impair existing water rights and is neither
16 contrary to the conservation of water within the state nor
17 detrimental to the public welfare of the state. Unless the
18 state engineer objects to the transfer within thirty days of
19 written notice of the intended transfer by the board to the
20 state engineer, the transfer is deemed approved by the state
21 engineer and the transfer may occur, subject only to objection
22 by an objector substantially and specifically affected by the
23 one-year transfer of the deposited water right. Upon any
24 objection, the transfer shall be reviewed by the state
25 engineer, who shall provide his findings to the board about

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1 the transfer and the objection. If the state engineer objects
2 to the transfer or determines that the transfer may adversely
3 affect the objector, he shall provide his findings and
4 objection or determination in writing to the board and the
5 board shall then rescind or modify the transfer to avoid any
6 adverse effect on the objector's water right.

7 Section 12. [NEW MATERIAL] DEPOSITS--EXEMPT FROM
8 FORFEITURE.--A water right, eligible for deposit as determined
9 by board rule, may be deposited in the water bank for a term
10 of up to ten years and may be transferred annually during the
11 deposit term, pursuant to the terms of the New Mexico Water
12 Banking Act and rules promulgated pursuant to that act.
13 During the deposit term, a deposited water right is exempt
14 from forfeiture pursuant to Sections 72-5-28, 72-6-3 and
15 72-12-8 NMSA 1978.

16 Section 13. [NEW MATERIAL] FEES AND REPORTS.--

17 A. Fees shall be imposed on each transfer of water
18 rights on deposit with the water bank and for administration
19 and operation of the water bank.

20 B. By rule, the board shall set:

21 (1) the administration and operation fees to
22 be charged to and paid by the transferee of each deposited
23 water right to the water bank;

24 (2) annually, the transfer fees to be paid by
25 the transferee to the water bank, considering the type and

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1 duration of the transfer and the amount, quality and intended
2 use of the deposited water rights to be transferred; and

3 (3) the percentage of the transfer fee to be
4 paid to the depositor for the transfer made and the percentage
5 of the transfer fee retained by the water bank for making the
6 transfer.

7 C. By rule, the board shall establish the
8 procedures for setting the fees imposed by this section and
9 procedures for the calculation and payment of the percentage
10 of the transfer fee to be paid to the depositor.

11 D. Fees may be imposed or paid for public interest
12 uses of deposited water rights made pursuant to Subsection B
13 of Section 8 of the New Mexico Water Banking Act.

14 Section 14. [NEW MATERIAL] WATER BANK FUND
15 ~~CREATED--FUNDING.--~~There is created in the state treasury the
16 "water bank fund" to be used solely for the administration and
17 operation of the water bank by the board and the authority.
18 The water bank fund is to be financed by appropriations from
19 the general fund to the board, fees assessed and collected by
20 the board in administering the New Mexico Water Banking Act
21 and such other financing as is permitted by law. Income or
22 interest earned on the investment of the fund shall remain in
23 the fund. Money shall be expended pursuant to warrant issued
24 by the department of finance and administration pursuant to
25 vouchers signed by the director of the authority. Any

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1 unexpended or unencumbered balance of the water bank fund
2 shall not revert to the general fund but shall remain on
3 deposit in the fund for administrative and operating costs of
4 the water bank.

5 Section 15. [NEW MATERIAL] OTHER TRANSFERS. -- Nothing in
6 the New Mexico Water Banking Act shall prevent the sale or
7 purchase of water or water rights by or through persons other
8 than the board or authority to the extent permitted by and in
9 accordance with law.

10 Section 16. [NEW MATERIAL] CONSERVATION OF WATER
11 RIGHTS. -- Subject to Section 7 of the New Mexico Water Banking
12 Act, the amount of water rights conserved by a water right
13 owner may be deposited in the water bank in the amount
14 conserved, subject further to board rule establishing
15 eligibility terms for the conserved water deposit and the
16 calculation of the water conserved.

17 Section 17. Section 72-5-28 NMSA 1978 (being Laws 1907,
18 Chapter 49, Section 42, as amended) is amended to read:

19 "72-5-28. FAILURE TO USE WATER-- FORFEITURE. --

20 A. When the party entitled to the use of water
21 fails to beneficially use all or any part of the water claimed
22 by him, for which a right of use has vested for the purpose
23 for which it was appropriated or adjudicated, except the
24 waters for storage reservoirs, for a period of four years,
25 such unused water shall, if the failure to beneficially use

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1 the water persists one year after notice and declaration of
2 nonuser given by the state engineer, revert to the public and
3 shall be regarded as unappropriated public water; provided,
4 however, that forfeiture shall not necessarily occur if
5 circumstances beyond the control of the owner have caused
6 nonuse, such that the water could not be placed to beneficial
7 use by diligent efforts of the owner; and provided that
8 periods of nonuse when irrigated farm lands are placed under
9 the acreage reserve program or conservation reserve program
10 provided by the federal Food Security Act of 1985, P. L. 99-198
11 shall not be computed as part of the four-year forfeiture
12 period; and provided, further, that the condition of notice
13 and declaration of nonuser shall not apply to water [~~which~~
14 that has reverted to the public by operation of law prior to
15 June 1, 1965.

16 B. Upon application to the state engineer at any
17 time and a proper showing of reasonable cause for delay or for
18 nonuse or upon the state engineer finding that it is in the
19 public interest, the state engineer may grant extensions of
20 time, for a period not to exceed three years for each
21 extension, in which to apply to beneficial use the water for
22 which a permit to appropriate has been issued or a water right
23 has vested, was appropriated or has been adjudicated.

24 C. Periods of nonuse when water rights are
25 acquired by incorporated municipalities or counties for

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1 implementation of their water development plans or for
2 preservation of municipal or county water supplies shall not
3 be computed as part of the four-year forfeiture statute.

4 D. A lawful exemption from the requirements of
5 beneficial use, either by an extension of time or other
6 statutory exemption, stops the running of the four-year period
7 for the period of the exemption, and the period of exemption
8 shall not be included in computing the four-year period.

9 E. Periods of nonuse when the nonuser of acquired
10 water rights is on active duty as a member of the armed forces
11 of this country shall not be included in computing the four-
12 year period.

13 F. The owner or holder of a valid water right or
14 permit to appropriate waters for agricultural purposes
15 appurtenant to designated or specified lands may apply the
16 full amount of water covered by or included in the water right
17 or permit to any part of the designated or specified tract
18 without penalty or forfeiture.

19 G. Periods of nonuse when water rights are
20 acquired and placed in a state engineer-approved water
21 conservation program, by an individual or entity that owns
22 water rights, a conservancy district organized pursuant to
23 Chapter 73, Articles 14 through 19 NMSA 1978, a soil and water
24 conservation district organized pursuant to Chapter 73,
25 Article 20 NMSA 1978, an acequia or community ditch

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1 association organized pursuant to Chapter 73, Article 2 or 3
2 NMSA 1978, an irrigation district organized pursuant to
3 Chapter 73, Articles 9 through 13 NMSA 1978 or the interstate
4 stream commission shall not be computed as part of the four-
5 year forfeiture period.

6 H. Periods when water rights are deposited in the
7 New Mexico water bank pursuant to the New Mexico Water Banking
8 Act shall not be computed as part of the four-year forfeiture
9 period. "

10 Section 18. Section 72-12-8 NMSA 1978 (being Laws 1931,
11 Chapter 131, Section 8, as amended) is amended to read:

12 "72-12-8. WATER RIGHT FORFEITURE. --

13 A. When for a period of four years the owner of a
14 water right in any of the waters described in Sections 72-12-1
15 through 72-12-28 NMSA 1978 or the holder of a permit from the
16 state engineer to appropriate any such waters has failed to
17 apply them to the use for which the permit was granted or the
18 right has vested, was appropriated or has been adjudicated,
19 the water rights shall be, if the failure to beneficially use
20 the water persists one year after notice and declaration of
21 nonuser given by the state engineer, forfeited and the water
22 so unused shall revert to the public and be subject to further
23 appropriation; provided that the condition of notice and
24 declaration of nonuser shall not apply to water [~~which~~] that
25 has reverted to the public by operation of law prior to June

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1 1, 1965.

2 B. Upon application to the state engineer at any
3 time and a proper showing of reasonable cause for delay or for
4 nonuse or upon the state engineer finding that it is in the
5 public interest, the state engineer may grant extensions of
6 time, for a period not to exceed three years for each
7 extension, in which to apply to beneficial use the water for
8 which a permit to appropriate has been issued or a water right
9 has vested, was appropriated or has been adjudicated.

10 C. Periods of nonuse when irrigated farm lands are
11 placed under the acreage reserve program or conservation
12 reserve program provided by the federal Food Security Act of
13 1985, P. L. 99-198, shall not be computed as part of the four-
14 year forfeiture period.

15 D. Periods of nonuse when water rights are
16 acquired and placed in a state engineer-approved water
17 conservation program by an individual or entity that owns
18 water rights, an artesian conservancy district, a conservancy
19 district, a soil and water conservation district organized
20 pursuant to Chapter 73, Article 20 NMSA 1978, an acequia or
21 community ditch association organized pursuant to Chapter 73,
22 Article 2 or 3 NMSA 1978, an irrigation district organized
23 pursuant to Chapter 73, Articles 9 through 13 NMSA 1978 or the
24 interstate stream commission shall not be computed as part of
25 the four-year forfeiture statute.

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1 E. A lawful exemption from the requirements of
2 beneficial use, either by an extension of time or other
3 statutory exemption, stops the running of the four-year period
4 for the period of the exemption, and the period of exemption
5 shall not be included in computing the four-year period.

6 F. Periods of nonuse when water rights are
7 acquired by incorporated municipalities or counties for
8 implementation of their water development plans or for
9 preservation of municipal or county water supplies shall not
10 be computed as part of the four-year forfeiture statute.

11 G. Periods of nonuse when the nonuser of acquired
12 water rights is on active duty as a member of the armed forces
13 of this country shall not be included in computing the four-
14 year period.

15 H. The owner or holder of a valid water right or
16 permit to appropriate waters for agricultural purposes
17 appurtenant to designated or specified lands may apply the
18 full amount of water covered by or included in that water
19 right or permit to any part of the designated or specified
20 tract without penalty or forfeiture.

21 I. Periods when water rights are deposited in the
22 New Mexico water bank pursuant to the New Mexico Water Banking
23 Act shall not be computed as part of the four-year forfeiture
24 period. "

25 Section 19. APPROPRIATION.--Two hundred fifty thousand

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1 dollars (\$250,000) is appropriated from the general fund to
2 the water bank fund for expenditure in fiscal year 2000 and
3 subsequent fiscal years by the New Mexico water bank board for
4 the purpose of carrying out the provisions of the New Mexico
5 Water Banking Act. Any unexpended or unencumbered balance
6 remaining at the end of any fiscal year shall not revert to
7 the general fund.

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